ORAL ARGUMENT NOT YET SCHEDULED

No. 18-72416

UNITED STATES NINTH CIRCUIT COURT OF APPEALS

National Labor Relations Board
Petitioner

v.

Lucky Cab Company
Respondent

APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

RESPONDENT LUCKY CAB COMPANY'S BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties

The parties to the National Labor Relations Board ("NLRB" or "Board") cases below were: Lucky Cab Company, as respondent ("Lucky Cab"); the Industrial, Technical and Professional Employees Union, Local 4873 affiliated with Office and Professional Employees International Union, as charging party ("Union"); and the General Counsel of the NLRB ("GC"). The parties to this case are Respondent Lucky Cab and Petitioner the NLRB.

B. Rulings Under Review

NLRB has petitioned the Court for enforcement of the Board's Decision in NLRB Case 28-CA-023508, which was entered on April 4, 2018, and is reported at 366 NLRB No. 56 (2018).

C. Related Cases

The related cases are United States Court of Appeals for the District of Columbia Circuit No. 14-1029 consolidated with 14-1057, reported as 621 Fed. Appx. 9 (2015). These cases addressed the underlying issue of whether Lucky Cab’s discharge of the affected employees was permissible under the National Labor Relations Act.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Ninth Circuit, Lucky Cab discloses that: it is a non-governmental entity and not publicly traded. Lucky Cab operates a taxicab service in Las Vegas, Nevada.

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I. JURISDICTIONAL STATEMENT

The NLRB had subject matter jurisdiction over the underlying matters, Case Nos. 28-CA-023508, under 29 U.S.C. § 160(a). The Board issued a Supplemental Decision and Order on April 4, 2018. The Board's Decision is reported as *Lucky Cab Company*, 366 NLRB No. 56. In accordance with Rule 15(b) of the Federal Rules of Appellate Procedure, Respondent Lucky Cab submitted its answer to the Petitioner National Labor Relations Board's August 31, 2018, Application for Enforcement of an Order of the National Labor Relations Board to this Court on September 20, 2018.

This Court has jurisdiction over the Petitioner's Application for Enforcement pursuant to Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. § 151, 160(e)). Venue is proper in this Ninth Circuit because all aspects of Lucky Cab's operations are conducted in Nevada, pursuant to Chapter 706 of the Nevada Revised Statues ("NRS").

II. STATEMENT OF THE ISSUES

1. Whether the Board erred by awarding the drivers backpay that was substantially greater than any losses actually suffered by the drivers.

2. Whether the Board erred by reducing interim earnings through meal deductions when calculating the offset to the drivers' backpay.

3. Whether the Board's calculations of the drivers' interim earnings were supported by substantial evidence.

4. Whether the Board erred by finding that a driver who refused to apply for a single job in the cab industry conducted a reasonable search for interim employment.

III. STATEMENT OF THE CASE

A. Procedural History

In 2011, Respondent Lucky Cab Company ("Lucky Cab") discharged six employees. The National Labor Relations Board ("Board" or "NLRB") alleged that these discharges constituted unfair labor practices. On November 3, 2015, the United States Court of Appeals for the District of Colombia Circuit enforced an Order of the Board requiring Lucky Cab to reinstate the six drivers and make them whole for the loss of earnings and other benefits suffered as a result of their discharges. Lucky Cab subsequently offered the drivers reinstatement, which was rejected by all six discharged employees. The Board and Lucky Cab then sought to calculate the correct amount of backpay owed to the six drivers. The parties reached agreement concerning the amount owed to one of the drivers. However, the Board's calculations regarding backpay for the other drivers has been an issue of contention. Lucky Cab disputes the make whole remedy due the remaining five drivers as to the proper amount of back pay owed.

After a 10-day compliance hearing, Administrative Law Judge Jeffery Wedekind (the Judge) issued a decision on September 18, 2017, awarding backpay to these five drivers. Lucky Cab excepted to the Judge's decision and brought the issue to the Board. The Board delegated its authority to a three-member panel, which ultimately affirmed the Judge's ruling, findings, and conclusions, and adopted the recommended Order. On August 31, 2018, the Board filed an application for the enforcement of this Order. Lucky Cab now seeks review and correction of the Order.

B. Statement of Relevant Facts

In 2011, Lucky Cab Company terminated six employees whom had been employed as taxicab drivers. *Lucky Cab Co.* 366 NLRB No. 56 (2018). Their job duties involved driving taxicabs in Las Vegas and transporting passengers. *Id*. at 280. The ex-employees were all initially hired as extra drivers, meaning that they were not assigned a specific route or shift. *Id*. Over time as routes and shifts became available, the ex-employees were converted to permanent drivers and given specific shifts and routes assignments. *Id*. Later, they were permitted to select the shifts and routes they decided were more desirable. *Id*. Each driver had been working with Lucky Cab for several years when they were terminated. *Id*.

In 2011, the unemployment rate was at a historic high of 13%. (R.App. 2) Nonetheless, three of the drivers applied for and found work within the cab industry as drivers within a few months of their termination from Lucky Cab. (R.App. 42, 48,

57) Mr. Hambamo, Mr. Hailu, and Mr. Kindeya were all hired by cab companies in 2011. (*Id*.) Mr. Kindeya was later hired by another cab company, Frias, in December of 2013 after he was terminated by Whittlesea, the company with which he found employment with in August of 2011. (R.App. 4) Despite the high unemployment rate at the time, there were many jobs available as cab drivers in Las Vegas from 2011 through 2013. (R.App. 3-4)

The new hires at the hiring cab companies would have started as "extra board" drivers meaning that they would not have the benefits that are provided after longer employment, such as selecting a route and shift. (R.App. 4) If taxis were not available they would not be assigned a shift for that day, and they would most likely have been assigned a restricted medallion. (*Id*.) A restricted medallion is a license for a taxicab that is not permitted to pick up from the Las Vegas Strip, Downtown, or Airport. (*Id*.) During her employment with Lucky Cab and at the time of her termination, Ms. Geberselasa was assigned a restricted medallion. *Lucky Cab Co.* 360 NLRB 271 (2014) at 284-85, enfd. 621 Fed. Appx. 9 (D.C.Cir 2015). The new hires would have had to wait a few months before qualifying for the same or similar benefits as the drivers had with Lucky Cab, including medical benefits, and paid vacation leave after 1 year of employment. (R.App. 4)

After being terminated by Lucky Cab on Feb 24, 2011, Ms. Geberselasa applied for unemployment and searched for work as a cashier at hotels and casinos

and gas stations. (R.App. 3) She also searched for work as a food runner, gourmet busser and housekeeper at the hotel and casinos. (*Id*.) In 2012, she began applying for the same jobs listed above, as well as a limo driver and card dealer. (*Id*.) She also traveled to Ethiopia from early August of 2012 through mid-October of 2012. (*Id*.) Ms. Geberselasa remained unemployed up until February 2013 when she was hired as a card dealer. (*Id*.) Throughout the two-year period she was unemployed, she did not apply for a single job in the cab industry, even though she knew they were available. (R.App. 33-34) She refused to apply for a job as a cab driver because she believed they were not good enough compared to her job at Lucky Cab and instead chose to seek work in different industries altogether. (R.App. 5) The alleged backpay owed to Ms. Geberselasa totals to $37,312. (R.App. 22)

On July 14, 2011, Mr. Demeke gained employment with Swift Transportation and remained employed with Swift for 4 to 5 months until early December 2011 when he decided to become an independent contractor truck driver. (R.App. 5) In February of 2012, he was hired by Habesha/This Transportation and worked for the company for approximately 10 months. (*Id*.) In mid-November 2012, he left Habesha/This and started his own company, Nahom Transportation LLC. (*Id*.) He operated Nahom trucking for 2 years and worked as a driver for Nahom only through April or May of 2013. (*Id*.) He focused almost all of his efforts on dispatching other drivers working for Nahom and handling the paperwork for Nahom until the

company closed in 2015. (*Id*.) The total amount of alleged backpay owed to Mr. Demeke is $65,131. (R.App. 22)

Mr. Hailu quit his employment with Whittlesea on September 9, 2011 and began searching for work as a truck driver. (R.App. 12) He was hired by Swift Transportation in October of 2011. (*Id*.) He worked for Swift for a few months before determining the pay was not enough and quitting to drive as an independent contractor. (*Id*.) He began working for Direct Haul as an independent contractor driver in February 2012. (*Id*.) He worked for Direct Haul for some time before quitting to start his own trucking company in February 2014, with which he hauled freight loads for 200 days in 2014. (*Id*.) The total amount of alleged backpay owed to Mr. Hailu is $21,736. (R.App. 22)

Mr. Hambamo was hired by the Frias cab company, in particular ANLV cab, in August of 2011. (R.App. 18) One month later he quit and searched for employment as a truck driver. (*Id*.) On March 20, 2012, he was successful and was hired as a driver for Swift Transportation. (*Id*.) However, only few months later, on June 28, 2012, he quit. (*Id*.) Two weeks later, he was hired by ANF Frieght aka Bal Carrier and Cargo Solutions as an independent contractor truck driver. (*Id*.) Mr. Hambamo worked there until September 28, 2013, when he resigned from the company. (*Id*.) He began working for Nahom as an independent contractor on October 23, 2013, where he remained working until January 28, 2014 when he

decided to quit from Nahom and start his own trucking company. (R.App. 18) On March 20, 2014, Mr. Hambamo started his new company, Elnathan Express LLC, with which he hauled freight with throughout the rest of 2014. (*Id*.) The total amount of alleged backpay owed to Mr. Hambamo is $25,427. (R.App 22)

The IRS permits independent contractor truck drivers to deduct from their income the cost of their meals on a per diem basis. (R.App. 9, 24-25). The deduction can be the actual costs of meals but may also be a reasonable approximation calculated by multiplying the number of days worked times the per diem meal rate for the specific year times .8 (the deductible portion of meal expenses). (R.App. 9) The per diem meal rate was $59 per day in 2012, 2013, and 2014. (R.App. 25, 28, 31) During the times that the drivers who became independent contractor truck drivers were working for Swift or any cab companies, they were not permitted to deduct their meals from their taxes, were responsible for paying for their meals, and were not reimbursed for those meals. (R.App. 62, 66-67) Mr. Hailu claimed the meal deduction for three years. (R.App. 14, 16) He claimed a deduction of $14,400 in 2012, a deduction of $8,932 in 2013, and $9,440 in 2014. (*Id*.) Mr. Hambamo claimed a meal deduction of $13,783 in 2013. (R.App. 20)

Mr. Demeke claimed a meal deduction in 2012 and 2013. (R.App. 9-10) In 2012, he claimed to have worked 300 calendar days. (R.App. 9) He worked every day from February through October of 2012, as well as 13 days in November 2012

and 14 days in December of 2012. (*Id*.) As a result, he claimed a meal deduction of $14,160 for the year of 2012. (*Id*.) While only driving for Nahom Trucking as an independent contractor for only four or five months for the year of 2013, Mr. Demeke claimed a meal deduction of $13,208. (R.App. 10)

IV. SUMMARY OF THE ARGUMENT

When a company is found to have violated the National Labor Relations Act by unlawfully terminating its employees, the remedy is to restore the employees to the position they would have been in had they not been terminated. There are no fines or other punitive measures. Instead, the employees are offered their jobs back, with back pay for the time that was missed. Of course, the employees must mitigate their damages in the meantime by seeking and accepting comparable employment. Any income earned by the employees during that applicable period is used to offset the remedial backpay that would otherwise be due to the employees. The Board is required to compare "apples to apples" when offsetting backpay, including any nonmonetary benefits.

Here, several employees chose to become self-employed truck drivers after being terminated by Lucky Cab. These three drivers, Mr. Demeke, Mr. Hailu, and Mr. Hambamo, earned substantial income as truck drivers, so much so that they declined to return to Lucky Cab after the Board found in their favor. As self-employed workers, these three drivers took advantage of tax deductions in the form

of a per diem meal allowance, which they used to reduce their taxable income substantially. Importantly, the drivers did not have any kind of meal stipend, allowance, or deduction while working for Lucky Cab.

After these three drivers refused to return to Lucky Cab, the Board calculated their remedial backpay based, in large part, on their tax returns. Specifically, the Board used the drivers' taxable net income, after the deductions for meals had been made. In doing so, the Board reduced their self-employment income substantially, implicitly finding that the drivers were entitled to free meals in their new jobs. However, the Board ignored this meal compensation when calculating the offset for backpay owed to the drivers, resulting in a backpay calculation that improper and inaccurate.

Additionally, the Board has upheld the drivers' calculations regarding the meal expense deductions even when faced with overwhelming evidence that those calculations were incorrect. The most blatant example was in Mr. Demeke's case, as both his 2012 and 2013 meal deductions were greater than permissible under IRS regulations.

A fourth terminated driver, Ms. Geberselasa, did not pursue self-employment. Instead, she chose to leave the transportation industry completely to pursue a career as a casino dealer or cocktail waitress. However, she had no experience in either field, and she ended up spending more than two years unemployed. In the meantime,

the undisputed facts show that taxi companies throughout the area were hiring consistently. This driver could have easily obtained a job in the same field from which she was terminated, but she unilaterally chose not to. The Board found this decision reasonable, contradicting its own precedents and policies which require a good-faith search for interim employment in jobs that were comparable with the employee's past work history and consistent with her skills. The Board erred by finding that Lucky Cab should be required to underwrite the entirety of this career change.

V. STANDING

As the party aggrieved by the Board's decision, Lucky Cab has standing under 29 U.S.C. § 160(f) and FRAP 15 to seek review by this Court and seek the denial of the enforcement of the Order.

VI. ARGUMENT

A. Standard of Review.

If the Board's findings of fact are not supported by substantial evidence, or the Board has incorrectly applied the law, then the Court of Appeals may overturn the Board decisions. *California Pac. Medical Ctr. v. NLRB*, 87 F.3d 304 (9th Cir. 1996), citing *NLRB v. General Truck Drivers*, 20 F.3d 1017 (9th Cir. 1994). "The substantial evidence test requires a case-by-case analysis and a review of the whole record and requires a reviewing court to take into account whatever in the record

fairly detracts' from the Board's conclusions." *Wash. State Nurses Ass'n v. NLRB*, 526 F.3d 577 (9th Cir. 2008) (internal quotation marks and citations omitted). "Findings that are not supported by substantial evidence on the record as considered as a whole must be set aside." *Id*.

B. The Board erred by deducting the costs of meals from the self-employed drivers' income when calculating their interim earnings.

> When the Board determines that an employee has been subjected to an unfair labor practice, it has broad discretion to fashion a back pay order that effectuates the policies underlying the NLRA. Requiring an employer to make the employee whole through back pay serves a two-fold objective: (1) the back pay reimburses the innocent employee **for the actual losses which he has suffered** as a direct result of the employer's improper conduct, and (2) it furthers the public interest advanced by the deterrence of such illegal acts.

NLRB v. St. George Warehouse, Inc., 645 F.3d 666, 672 (3d. Cir. 2011) (internal quotations omitted) (emphasis added). Board policy requires that nonmonetary benefits provided to the discharged employee as part of his or her interim employment are added at interim earning calculations. *Empire Worsted Mills*, 53 NLRB 683, 692 (1943). Job-related expenses that would have been incurred but not reimbursed if the drivers continued to work for Lucky Cab cannot be deducted from interim earnings. *Cimpi Transportation Company*, 266 NLRB 1054, 1055 (1983). Additionally, "[s]elf-employment should be treated like any other interim employment in measuring back pay liability." *Kansas Refined Helium Co.*, 252 NLRB 1156 (1980). In other words, self-employment income is to be treated no

differently from income earned at any other interim employer. Relevant to the present matter, meal expenses should not be deducted from interim earnings if those expenses would have been incurred at the employee's expense while working for Lucky Cab. *Cimpi Transportation Company*, 266 NLRB at 1055 (1983).

It is undisputed that when Mr. Demeke, Mr. Hailu, and Mr. Hambamo worked for Lucky Cab -- and subsequently for Swift, a trucking company – they had to pay for their own meals and the cost of those meals was not deducted from their income. *See*, for example, (R.App. 62, 66-67) The costs of the meals and the fact that the drivers had to pay for the meals remained the same when the drivers became self-employed and independent contractors. The only difference is that a self-employed or independent contractor truck driver is permitted by the IRS to deduct the cost of meals from his or her taxes on a per diem basis. The Board incorrectly determined that simply because the drivers were independent contractors the meal deductions were not compensation and not to be added to interim earnings. (R.App. 9) The Board cited no authority supporting this conclusion.

No legal authority or Board precedent allows the Board to deduct meal expenses from interim earnings when those meal expenses were not part of the drivers' pre-discharge earnings – whether the interim earnings were from an employer or self-employment. Here, the meal expenses were incurred by the drivers during their interim self-employment, exactly as they would have been incurred at

the employees' expense while working for the Lucky Cab. This deduction is the equivalent of a company paying for the drivers' meal costs during their self-employment.

The Board found that in 2012 Demeke was permitted to claim $14,160 in meal expenses, and thus his interim earnings were $18,192. (R.App. 9-10) In 2013, Demeke claimed $13,208 in meal expenses and had interim earnings of $27,993. (R.App. 10-11) The Board found that in 2012, Mr. Hailu was permitted a $14,440 meal deduction and had interim earnings of $26,327. (R.App. 14) In 2013, he deducted $8,932 for meal expenses and had interim earnings of $22,489. (R.App. 16) In 2014, he claimed $9,440 in meal expenses and had interim earnings of $25,401. (*Id*.) The Board found that Mr. Hambamo was entitled to claim $13,783 for meal expenses in 2013, and had interim earnings of $20,020. (R.App. 20) This Court should determine that the Board's decision regarding the meal deductions is clearly erroneous and not supported by substantial evidence. These deductions should be added back to the drivers' interim earnings, and the backpay calculations should be reduced accordingly.

C. The Board erred in concluding that Demeke's meals deductions claimed on his 2013 tax return were supported by substantial evidence.

If this Court chooses not to overturn the Board's error regarding meal deductions, it should at least address the blatant misrepresentation in Mr. Demeke's

tax returns. Specifically, Mr. Demeke claimed a meal deduction of $13,208 in 2013, although he testified that he only worked four to five months as an independent contractor truck driver during that entire year. (R.App. 5, 9, 80) He did not testify as to what exact months or the exact number of days worked, but it is impossible to claim that high of a deduction while only working the calendar days of four or five months. Giving Mr. Demeke every benefit of the doubt, and assuming that he did work as a driver for a full five months in 2013, with no time off at all, the maximum per diem meal deduction he could properly claim would be $7,221.60 (153 days x .8 x $59 per diem rate for 2013). Obviously, the actual amount would likely be much less, as Mr. Demeke probably did not work every single day for a full five months. However, Mr. Demeke claimed $13,208 in meal expenses on his 2013 tax return, a number that cannot be supported even if all of his testimony is credited.

Lucky Cab has identified numerous other inconsistencies in Mr. Demeke's tax returns and testimony before the Board. Mr. Demeke admitted at the hearing that he destroyed all supporting documents that may have existed, and he did not produce anything in response to Lucky Cab's subpoena. (R.App. 72-73) However, this one simply cannot be resolved or dismissed as a mere "credibility finding" that should be upheld by the Board or this Court.

D. The Board's conclusion that the drivers were not required to search for work as cab drivers incorrectly applied the law.

"Longstanding remedial principles establish that backpay is not available to a discriminatee who has failed to seek interim employment and thus incurred a willful loss of earnings." *St. George Warehouse*, 351 NLRB 961, 963 (2007), citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941), and *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965). The failure "to make a reasonable search for work" is always considered a willful loss of earnings. *EDP Medical Computer Systems*, 304 NLRB 627, 636 (1991); *St. George Warehouse*, supra. Failure to seek interim employment in the same industry is not enough on its own to make an employee ineligible for backpay. See, e.g. *Fugazy Continental Corp.*, 276 NLRB 1334, 141 (1985), enfd. 17 F2.d 979 (2d Cir. 1987); and *De Jana Industries*, 305 NLRB 845, 846 fn. 6 (1991) ("Backpay rights are not dependent on efforts to seek precisely the same type of employment from which the discriminatee was discharged.") But, "in order to be entitled to backpay, an employee must at least make 'reasonable efforts to find new employment which is *substantially equivalent to the position [which he was discriminatorily deprived of] and is suitable to a person of his background and experience*.' " *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1318 (D.C. Cir. 1972), citing *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575 (5th Cir. 1966) (modifications in original). "It is well settled that to be entitled to backpay a discriminatee must make reasonable efforts to secure interim employment which is substantially equivalent to the position from which he

was discharged." *EDP Medical Computer Systems*, 302 NLRB 54 (1991), citing *Southern Silk Mills*, 116 NLRB 769, 773 (1956), enfd. denied 242 F.2d 697 (6th Cir. 1957), and *NLRB v. Seligman & Associates*, 808 F.2d 1155, 1166 (6th Cir. 1986), cert. denied 484 U.S. 1026 (1988). "The entire circumstances" must be considered to determine whether an employee has made a reasonable and "honest, good faith effort" to "mitigate the loss earnings flowing from" the unlawful discharge. *Rainbow Coaches*, 280 NLRB 166, 187 (1986); and *Lozano Enterprises*, 152 NLRB 258, 263 (1965), enfd. 356 F.2d 483 (9th Cir. 1966). To award backpay to drivers without sufficient regard for a discriminatee's mitigation obligation is inconsistent with public policy." *St. George Warehouse*, supra, at 967.

There are two factual elements that must be established for Lucky Cab to successfully argue that a driver incurred a willful loss by not making a reasonable search for work: "(1) there were substantially equivalent jobs within the relevant geographic area; and (2) the discriminatee unreasonably failed to apply for those jobs." *St. George Warehouse*, 351 NLRB 961 (2007). To determine the substantial equivalence of the jobs, Board precedent requires the comparison of "various criteria, such as pay, working conditions, job duties, commutes, and work locations." *Pennslyvania State Corrections officers Association*, 264 NLRB No. 108, slip op. at *5 (2016) (finding that a correctios officer position was not substantially equivalent to a grievance manager position because they differed in pay, job duties, and working

conditions).

1. The Board erred by inferring that the available cab driver jobs in the area during the relevant period were not substantially equivalent to the jobs at Lucky Cab.

The Board through adoption of the Judge's decision and order, incorrectly determined that the available jobs in the cab industry were not substantially equivalent to the employment with Lucky Cab Company. According to Board precedent, whether a job is "substantially equivalent" depends on "various criteria, such as pay, working conditions, job duties, commutes, and work locations." *Pennsylvania State Corrections Officers Association*, 364 NLRB No. 108, slip op. at *5 (2016). Here, it is undisputed that the drivers were taxi drivers before their termination from Lucky Cab. *Lucky Cab Co.*, 360 NLRB 271 (2014) at 280-81, enfd. 621 Fed. Appx. 9 (D.C.Cir 2015). Their job duties involved driving taxicabs in Las Vegas and giving rides to passengers. *Id.* at 280. These ex-employees, like all of Lucky Cab's drivers, were "initially hired as 'extra' drivers, meaning they have no assigned route or shift." *Id.* "As shifts/routes become available, extra drivers are converted to permanent drivers and given specific shift/route assignments." *Id*. Lucky Cab had some medallions that were geographically restricted, and others that were not. *Id*. Over time, the taxi drivers were able to select more desirable shifts and routes. *Id.*

There are only two supposed differences between the Lucky Cab jobs and the

jobs that were available at other taxi companies. First, the Board found that new hires at other taxi companies, like new hires at Lucky Cab, would have started without any of the benefits that are provided after longer employment. For example, they would begin as "extra board" drivers, with no assigned route or shift. (R.App. 4) Similarly, they were not guaranteed a shift if taxis were not available. (*Id*.) New drivers were also "often assigned … restricted medallions." (*Id*.) The Board erred by giving any weight to this fact especially in regard to Geberselasa since she was assigned a restricted medallion while working for the Lucky Cab. *Lucky Cab Co.*, 360 NLRB 271 (2014) at 284-85, enfd. 621 Fed. Appx. 9 (D.C.Cir 2015). The Board assumed that the drivers as new drivers would have "[made] substantially less money per week." (R.App. 4)

The second supposed difference was the difference in nonmonetary benefits – medical benefits and paid vacation leave – between a new hire at any of the seven taxi companies and Lucky Cab. (R.App. 4) The evidence only indicates that a new driver at one of those seven cab companies would have had to wait a few months before qualifying for the same or similar benefits as the drivers had with Lucky Cab. *Id.* The evidence did not show that the benefits were unavailable to the new hire jobs, it merely indicates that the benefits were not immediately available, instead they would be deferred until the new driver had been employed with the company for a short amount of time. *Id*. To Lucky Cab's knowledge, there is no Board precedent

that states that a "substantially equivalent" job must be immediately identical or equivalent to the former employment. The Board's Order fails to identify any such precedent. To the contrary, Board precedent strongly implies that these taxi driver jobs are, indeed, substantially equivalent and basically identical. For example, the Board recently agreed that several companies' construction CDL jobs were all substantially equivalent, even though they appear to be much more diverse than the taxi driver jobs in the present case. *M.D. Miller*, 365 NLRB No. 57, slip op. at *4-5. The available jobs in the *M.D. Miller* case were also at union employers, like the available taxi driver jobs in this compliance hearing, and therefore presumably had similar seniority rules, yet they were still considered to be substantially equivalent. *Id.*

2. The Board erred in finding that the drivers were not required to search for any employment in the cab industry given the entire circumstances.

While there is no requirement that unlawfully terminated employees must search for interim employment in the same industry in order to be eligible for backpay. See, e.g. *Fugazy Continental Corp*., 276 NLRB 1334, 141 (1985) ("[A] discriminatee's failure to seek the same type of employment from which he was discharged does not make him ineligible for backpay."), enfd. 17 F2.d 979 (2d Cir. 1987). The "entire circumstances" must be considered to determine whether an employee has made a reasonable and "honest, good faith effort" to "mitigate the loss

earnings flowing from" the unlawful discharge. *Rainbow Coaches*, 280 NLRB 166, 187 (1986); and *Lozano Enterprises*, 152 NLRB 258, 263 (1965), enfd. 356 F.2d 483 (9th Cir. 1966). Given the "entire circumstances" it was erroneous for the judge to rule that Geberselasa had no need to apply for a single cab driver job during her two-year period of unemployment, and that her efforts to procure a job were reasonable.

Geberselasa was terminated on February 24, 2011 and did not find any employment until February 2013. (R.App. 3) During that two-year period she applied for unemployment and applied for cashier jobs at hotel/casinos and gas stations, as well as positions as a food runner, gourmet busser, and housekeeper at the hotel/casinos. (*Id*.) In 2012, she applied for the same jobs listed above as well as a job as a limo driver and a card dealer. (*Id*.) She traveled to Ethiopia from early August through mid-October of 2012. (*Id*.) From February 2011 up until February 2013, she remained unhired and refused to apply for a job in the cab driving industry. (*Id*.) During 2011, when she was terminated, unemployment was at a historic high of over 13 percent. (R.App. 2) However, it was well known that the cab industry was hiring. In fact, three of the other drivers, Hailu, Hambamo, and Kindeya were all hired by cab companies in 2011. (R.App. 42, 48, 57) Kindeya was hired by Whittlesea in August of 2011 and was later hired by Frias in December 2013 after having been terminated by Whittlesea. (R.App.4) Geberselasa knew the jobs were

available but refused to apply for them. (R.App. 33-34) Given the historically high unemployment rate in Las Vegas at the time, the fact that three of the other drivers were hired by cab companies, and her knowledge that jobs were available, it was erroneous to rule that given the entire circumstances her efforts were reasonable. The Board was incorrect in determining that she made an honest good faith effort to mitigate her losses during the two years she was unemployment because "the mere fact that Geberselasa did not apply or driver jobs at Frias and Whittlesea is not determinative." (R.App. 4) The Board's determination that Geberselasa's efforts were reasonable in light of the "entire circumstances" was an incorrect application of the law and should be overturned.

V. CONCLUSION

For the foregoing reasons, the Court should deny the NLRB's petition for enforcement of the Board's Order. The Order should be amended to reflect correct calculations of the back pay that is owed to the discharged employees. Ms. Geberselasa is not entitled to any back pay because she voluntarily chose to leave the taxicab industry, and Lucky Cab has no obligation to pay for her career change. Mr. Demeke, Mr. Hailu, and Mr. Hambamo are entitled to backpay, but not in the amounts claimed by the Board. For each of these self-employed drivers, the Board calculated their interim earnings by reducing their income with *per diem* meal expenses. However, meal expenses were not a benefit at Lucky Cab, and should not

have been factored into these calculations at all.

Therefore, Lucky Cab requests that this Court deny the petition for enforcement or, in the alternative, amend the Board's Order as follows:

Employee	**Backpay owed**
Almethay Geberselasa	$0.00
Elias Demeke	$37,763.00
Edale Hailu	$0.00
Malaku Tesema	$32,559 (unchanged)
Mesfin Hambamo	$11,654.00
TOTAL	$81,976.00

Further, Lucky Cab requests its fees and costs incurred in defending against the Board's actions in this matter.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Jason F. Lather, do hereby certify that this brief complies with Rule 32(a)(5) and (7)(B) of the Federal Rules of Appellate procedure. The brief utilizes a 14-point proportionally spaced face for text. The brief contains 5,265 words according to Microsoft Office Word 2014, the word-processing system used to prepare the brief.

Dated: December 19, 2018

Respectfully submitted,

/s/ Jason F. Lather_____
Jason F. Lather
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Attorney for Respondent
Lucky Cab Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing *Respondent Lucky Cab Company's Brief* was electronically filed on this 19th day of December 2018. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's electronic filing system.

/s/ Jason F. Lather
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